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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 805 !

October Term, 1970

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DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS
Petitioner

v.

THADDEUS KING, JR.,
Respondent

• • •

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

• • •

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The State of Texas prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 6, 1970.

OPINION BELOW

The opinion delivered in the court below is reported at —— F.2d —— and is appended to this petition as Appendix "A." The opinion of the United States District Court for the Southern District of Texas is reported at —— F.Supp. —— and a copy thereof is appended hereto as Appendix "B." A Stay of Mandate was granted by the United States Court of Appeals to and including October 4, 1970.

JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on July 6, 1970. (See Appendix "A"). This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and under Rule 19, §(b) Sup.Ct. Rules.

QUESTIONS PRESENTED

Respondent, Thaddeus King, Jr., ex-convict, was represented at his trial by one of three hired counsel. The United States District Court below on habeas corpus, concluded that the quality of the legal services accorded Thaddeus King, Jr., were so poor that he did not have the opportunity to present his side of the story; and therefore, was denied effective assistance of counsel, a fair trial, and due process of law. Under the circumstances, was King deprived of these rights protected by the:

(1) due process clause of the Fourteenth Amendment even though he was not represented by appointed counsel;

(2) due process and equal protection clause of the Fourteenth Amendment where the State of Texas had no actual notice of the inadequacies, misconduct, or lack of preparation of King's own attorneys.

(3) Whether the State of Texas denied King "the Assistance of Counsel for his Defense" that is guaranteed by the Sixth Amendment to the Constitution of the United States where he chose his own counsel to guide him through his trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 6:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment 14, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

STATEMENT OF FACTS

The conviction is for the possession of heroin; the punishment was assessed at sixteen (16) years confinement in the State penitentiary.

On January 12, 1966, Respondent, together with two other persons, was arrested by two City of Houston Police Officers for possessing heroin. On February 25, 1966, an examining trial was conducted in the Justice Court, Precinct No. 1 of Harris County, Texas. Respondent was represented by Rex Emerson, a licensed attorney from Houston, Texas. At that hearing, one of the Houston police officers identified the Respondent as being the person who had thrown out of a speeding car a substance later proved to have been heroin.

On October 10, 1966, Respondent appeared in court, represented by James T. Garrett, also a member of the Houston Bar. A waiver of trial by jury was signed in open court by the Respondent, his counsel and the State's counsel before entering a plea of not guilty. The written consent was also approved by the court and was filed with the papers in the case.

On that same date, Respondent was tried on his plea of not guilty before the court. While testifying, the two Houston police officers identified the Respondent as the driver of an automobile which they were following along a public street, when they saw him throw a small package from the left car window into the street. The package thrown from the car was immediately recovered by one of the officers. A chemical analysis by chemists showed that the substance in the package contained heroin. At the conclusion of testimony, the trial judge found Respondent guilty and assessed his punishment at sixteen (16) years confinement in the Texas Department of Corrections.

An appeal was duly perfected and the judgment of conviction was affirmed by the Court of Criminal Appeals on June 21, 1967, and Respondent's Motion for Rehearing was overruled by the court on July 26, 1967. The opinion of the court is reported in *King v. State*, 416 S.W.2d 823 (Tex.Crim.Apps. 1967).

After pursuing unsuccessfully available state remedies, Respondent filed an Application for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas.

On August 11, 1969, said court conducted a full evidentiary hearing and at the conclusion of same, held that Respondent had been denied the effective assistance of counsel within the spirit of the Sixth and Fourteenth Amendments to the United States Constitution.

Of course, the proof in such a case as this is not particularly difficult. The proof of the commission of the offense was such that it required very little testimony to prove a prima facie case against the Respondent.

(Transcript of Evidence, pages 124-125). (The testimony adduced at the habeas corpus hearing below, the Transcript of Evidence, will hereinafter be referred to as T.E. ——).

At the habeas corpus hearing below the testimony revealed that Respondent's mother and aunt *retained* Billy C. Powell, an attorney of Harris County, Texas, to represent Respondent on this charge. At the time he was retained to represent Respondent, Powell had two associates in the practice of law, Rex Emerson and James T. Garrett, both former members of the District Attorney's Office and both exceptionally well versed in the field of criminal law.

In the hearing below Respondent testified that somewhere between February 1-15 he met Billy C. Powell, Rex Emerson and a man named Sims on the third floor of the Harris County Jail. (T.E. 29). At that time Respondent "gave him my version of what happened." (T.E. 30). The conversation lasted "from 15 minutes to approximately 30 minutes, maybe, not longer than 30 minutes." (T.E. 30).

Prior to the return of the indictment against Respondent by the Grand Jury, an examining trial had been held in the Justice Court, Precinct No. 1 of Harris County, Texas, in which attorney Rex Emerson had appeared as counsel for Respondent. (T.E. 31).

At the examining trial one of the arresting officers testified that on the 12th day of January, 1966, he and another police officer had received reliable information from a credible source involving narcotics and the automobile in which Respondent was driving. The police officer testified that they observed the automobile

in question and followed said automobile, attempting to stop the automobile. The officers observed the Respondent roll down the window of his automobile, stick his hand out the window and throw something to the ground which was promptly retrieved by one of the officers and which later proved to be heroin. Mr. Emerson conducted a vigorous cross-examination at that hearing and *developed all* of the facts surrounding the actual commission of the offense. At the conclusion of the examining trial, the presiding judge bound the Respondent over to the Grand Jury which subsequently returned the indictment against him.

Respondent was informed by Powell at their first meeting that Emerson would handle the preliminary hearing. (T.E. 30).

Billy C. Powell, one of the attorneys hired to represent Respondent, testified that he was licensed to practice law in the State of Texas since May of 1957 and from January through October of 1960, he served as an Assistant District Attorney in Harris County, Texas. (T.E. 140). At the time of his employment to represent the Respondent Powell had in his employ Rex Emerson and James T. Garrett. (T.E. 142 and 143). Powell and Emerson spent about an hour or an hour and 15 minutes with the Respondent discussing the facts of his case. (T.E. 143). Powell told King "... that Mr. Emerson, Mr. Garrett and I worked together on these cases and we did discuss the facts of the case, the arrest, and whether or not the case, in our opinion, should be retried before a judge or before a jury, and then his background." (T.E. 144). Powell fully explained to Respondent the pros and cons of being tried by a judge instead of a jury and explained to him that

he had a right to be tried by a jury. (T.E. 144). Respondent discussed with Powell his prior criminal record. (T.E. 146). In view of his prior criminal record it was Powell's recommendation that he be tried by a judge instead of a jury. (T.E. 146). Powell emphasized to Respondent that either Mr. Emerson or Mr. Garrett would, in fact, try the case. (T.E. 147). Respondent agreed to this arrangement (T.E. 147). Powell testified that at that meeting the facts of the case were fully discussed in great detail. (T.E. 147-151).

After the examining trial was conducted by Emerson, discussions were held between Emerson, Garrett and Powell. (T.E. 152 & 169).

Rex Emerson testified that he had been practicing law for nearly thirty (30) years (T.E. 208) and that he had been hired by Powell to try criminal cases for him. (T.E. 208). He testified that he had gone to the county jail with Powell specifically to see Mr. King and later conducted the examining trial on February 25, 1966. Prior to the examining trial and after his first meeting with Respondent and Powell, Emerson visited the Respondent in the jail to discuss the facts of the case with him. (T.E. 209 & 210). For the third time and on the date of the examining trial Emerson conferred with Respondent just prior to the examining trial. (T.E. 210).

After the examining trial Emerson returned to his office and conferred with Powell concerning the examining trial. (T.E. 210). Emerson stated that after the examining trial he did discuss the case with Garrett. (T.E. 211).

Garrett testified that he had been licensed to practice since 1956 and had been in the District Attorney's

Office as an Assistant District Attorney for seven (7) years from 1958 through 1964. During that time he had had occasion to try in excess of a thousand cases. (T.E. 221). Garrett officed with Powell and they had a certain business arrangement whereby Garrett would try cases for Powell. In June or July of 1966, Garrett visited Respondent in the Harris County Jail in Houston, Texas. (T.E. 223 and 224). At that meeting with Respondent, Garrett introduced himself and told Respondent that he was associated with Powell. Respondent did not object to being represented by Garrett and discussed the facts of the case with him. (T.E. 224). On the week-end immediately preceding the day of the trial Garrett conferred with Respondent for the last time. (T.E. 225). Garrett recalls that he had seen Respondent on other occasions while Garrett was in the jail conferring with other prisoners. (T.E. 236).

Powell testified that prior to the trial he conferred with Garrett about the case.

On the morning of the trial Garrett conferred with Respondent relative to the trial itself and whether or not a judge or a jury should try the case and whether or not a plea of guilty should be entered. (T.E. 228 & 229).

Garrett testified that the defense of the case was based solely on an attempt to discredit the police officers' testimony by showing that the alleged offense had occurred during a high-speed chase of two automobiles in the nighttime. (T.E. 245, 338).

At this point it becomes necessary to examine the Statement of Facts of the trial itself, to establish whether or not the representation by attorney Garrett

was such as to render the trial a "farce, sham, or mockery of justice."

At the outset, Petitioner directs the attention of the Court to the fact that *Garrett had examined the transcript from the examining trial which summarized the entire case for the prosecution.*

The very first witness to testify in the trial was A. L. Fears, a member of the Narcotics Squad of the Houston Police Department. On January 24, 1966, he and Officer H. M. Gray received information at about 8:00 P.M. that Thaddeus King, Jr., and others, would be riding in a 1949 Dodge, color light blue, License No. MJP-419, 1965 Texas, in the vicinity of the 1000 block of West Dallas and that they would have heroin in their possession. (Statement of Facts, page 3). (The Statement of Facts will hereinafter be referred to as S.F. ——). They immediately drove to the location and noticed the described car heading east on West Dallas and began pursuit. The automobile fit the description given by the informer and had the exact same license number. Officer Fears testified that he observed the driver, "who was King, roll his window down and drop a small silver package from the window. At this time Officer Gray slowed the car down enough for me to get out of the car. I got out of the car and went around and picked up the package King had thrown out the window." (S.F. 5). The car was stopped immediately thereafter and Respondent and the passengers got out of their car and Officer Gray picked up another silver package from inside the automobile. (S.F. 6). Officer Fears testified that "I could see the windows were all up and as we were pulling alongside it with our lights shining we noticed the window go part of the way

down. It didn't go all the way down, and at this time I could see him extending his arm and drop the package to the ground." (S.F. 6). The officer testified that he knew Thaddeus King, Jr., prior to that night and did recognize him before he stopped the automobile. (S.F. 11).

Attorney Garrett then took Officer Fears on cross-examination and conducted a vigorous and thorough cross-examintion with more than ordinary resourcefulness attempting every possible way to discredit the officer. The cross-examination conducted by Garrett covers some fifteen (15) pages of testimony while the direct examination appears on only ten (10) pages of direct testimony.

The State then offered the testimony of a chemist who testified that the substance of the package contained heroin and rested.

The defense first called James Edward Mathis who testified that he was in the automobile together with King and another person on the night that they were arrested. He testified that he did not see any narcotic drugs coming out of the automobile while he was in the company of Respondent. (S.F. 34). On cross-examination Mathis testified that he had been previously convicted of a felony.

Respondent King took the stand and testified that the automobile was not his and that he had borrowed the car to look for a job on the day of the arrest. That while being followed by the police officers he had no idea it was police officers. He testified that he had not attempted to get away from the car following him because he had not violated any laws. (S.F. 39). Re-

spondent stated that while driving both of his passengers to their homes he attempted to make a turn and had to signal with his arm because the automobile had no turn signals. (S.F. 40). He then denied having thrown the package of heroin out of the car window. On cross-examination Respondent stated that he had had one conviction for possession of marijuana. (S.F. 41). He denied that the police officers ever pulled up beside him while he was driving the automobile (S.F. 42) and testified that the window of his automobile was down. He further testified that he had held his hand out of the window to make turn signals at least three times. (S.F. 43).

Arthur Lewis Walton was then called by the defense and testified that he was also in the company of the Respondent and James Edward Mathis on the night of the arrest and he did not see any heroin come in or go out of the automobile at any time. (S.F. 46). On cross-examination it was brought out that the witness had plead guilty in the adjoining courtroom and had admitted possession of the narcotics. He stated that "I just pleaded guilty to get it over with. I didn't want to face a jury. I had a prior conviction I was convicted in." (S.F. 48). He also admitted having been convicted of robbery by assault and of a misdemeanor involving moral turpitude. (S.F. 49). He denied that he had seen Respondent throw the package of narcotics out of the car window.

On rebuttal the State called Officer H. M. Gray, a member of the Houston Police Department, who was in the company of A. F. Fears on the night of the arrest. He corroborated the testimony of Officer Fears and testified in detail concerning the blue 1949 Dodge

automobile, License No. JMP-419, the location and time as related to them by the informer. He testified that he had known Respondent about twenty-five or thirty years (S.F. 53) and that he had recognized him as being the driver of the automobile.

Garrett then conducted a thorough and skillful cross-examination of Officer Gray attempting to discredit his testimony by showing that it was dark, that the automobiles were speeding and that it was impossible to see the Respondent driving the automobile. (S.F. 55, 56 & 57). After the cross-examination of this witness the State and the defense both rested and closed.

The court below in granting the Writ of Habeas Corpus concluded that it would grant the writ because ". . . the quality of the legal services accorded Petitioner were so poor that he did not have the opportunity to present his side of the story. He was, therefore, denied effective assistance of counsel, a fair trial, due process of law, . . ."

The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court below and held that the Respondent had been denied effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution. The court held that the Respondent's attorney at his trial was not "counsel reasonably likely to render and rendering reasonably effective assistance."

REASONS FOR GRANTING THE WRIT

(1) THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED

STATES COURT OF APPEALS FOR THE SECOND, FOURTH, FIFTH AND NINTH CIRCUITS.

The courts are divided on whether or not a distinction between retained counsel and appointed counsel is controlling in considering cases dealing with the adequacy-of-counsel. The majority decisions have drawn no distinction between retained counsel and appointed counsel in considering the adequacy of counsel question. See *Breedlove v. Beto*, 404 F.2d 1019 (5th Cir. 1968) at 1020 n.1; *United States ex rel. Maselli v. Reincke*, 383 F.2d 129 (2nd Cir. 1967); *Wilson v. Phend*, 417 F.2d 1197 (7th Cir. 1969); *Wilson v. Rose*, 366 F.2d 611 (9th Cir. 1966).

Other decisions, differentiating between appointed and retained counsel, have denied the ineffective assistance-of-counsel contention on the grounds that unless state officials outwardly prevent privately retained counsel from performing his duties, there is no state action and thus no denial of Fourteenth Amendment rights. See *Davis v. Bomar*, 344 F.2d 84 (6th Cir. 1965); *Hudspeth v. McDonald*, 120 F.2d 962 (10th Cir. 1941); *Johnson v. Smith*, 295 F.Supp. 835 (N.D. Ga. 1968); *Weatherman v. Peyton*, 287 F.Supp. 819 (W.D. Vir. 1968).

The Fifth Circuit Court of Appeals' standard for whether there was unconstitutionally ineffective counsel is apparently established in *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965). However, there is a conflict in the United States Court of Appeals for the Fifth Circuit on its position on the issue of whether the inquiry is limited to court-appointed counsel. This un-

certainty arises because of conflicting decisions by that court. In *Howard v. Beto*, 375 F.2d 441, 442 (5th Cir. 1968) (per curiam), the court stated in effect that an ineffective retained counsel's actions could not be imputed to the State. However, in *Bell v. Alabama*, 367 F.2d 243, 247 (5th Cir. 1966), Judge Tuttle, commenting on the effective assistance-of-counsel test stated:

> "It is clear that this test applies to cases in which counsel is retained by or for an accused as well as to cases in which counsel is appointed to represent an indigent defendant."

Furthermore, in *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962), Judge Brown stated:

> "The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court appointed."

In *Howard v. Beto*, supra, one panel of judges held that "there is, of course, a distinction to be made between the lack of effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel. It is the latter that opens the judgment to challenge by habeas corpus. Here the attorney's alleged incompetence cannot be imputed to the State." In *Breedlove v. Beto*, supra, another panel from the same circuit, in dictum, discussed the contention that defendant's retained counsel was so ineffective as to amount to an unconstitutional denial of counsel.

In its latest pronouncement the United States Court of Appeals for the Fifth Circuit in *Langford v. Alabama*, 422 F.2d 760 (1970) (reh.den. en banc) at page 763 rejected the dictum in *Breedlove* and adhered to

the holding in *Howard*. However, according to the opinion of the court below, the position taken by the court on the issue of whether the inquiry is limited to court-appointed counsel seems to be still in a state of fluctuation.

In rejecting claims of inadequate legal representation in state criminal proceedings, some cases hold that the Fourteenth Amendment only prescribes state activity and have maintained that without notice of the defense lawyer's inadequacies or misconduct, the State has not deprived the defendant of due process. See *United States ex rel. Wilkins v. Banmiller*, 205 F.Supp. 123 (E.D. Penn. 1962); *Holland v. Boles*, 225 F.Supp. 863 (N.D.W. Vir. 1963). Aside from the "state action" theory, when counsel is retained by the defendant, the tendency of many courts has been to lower the standard of "effective assistance" to which he is held. The rationale being that inasmuch as the defendant has made his own choice of counsel, he must bear the responsibility for the consequences, or at least a much greater responsibility than must the indigent for his appointed counsel.

For this reason it is submitted that this case presents a question of public importance which merits plenary review by this court.

(2) THE FEDERAL QUESTIONS HEREIN HAVE NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS COURT.

The basic question in this case would not seem to have ever come before this court. Prior cases before this court which come closest to presenting a question

similar to that in this case would seem to be *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) and *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942). The cases, however, do not directly touch upon the question of what constitutes the effective assistance of counsel.

The State of Texas urges that the pertinent test to be applied in a case where the competency of counsel is at issue is whether the representation of counsel was such that it rendered the trial a farce, a sham or mockery of justice. This standard was established in the United States Court of Appeals for the Fifth Circuit in *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965).

The court below completely ignored the manner in which James T. Garrett conducted the defense of Respondent's trial. Petitioner has elaborated at length and summarized the entire Statement of Facts to show the court that the trial was fairly conducted and that Respondent was not denied any of the procedural protections which are his by right under the federal Constitution. The Sixth Amendment right to counsel was not denied him. After everything has been said and done, Respondent is faced with the inescapable conclusion that: (1) he did not have court-appointed counsel, (2) he did retain counsel, (3) he was not a pauper, and (4) he chose his own counsel.

In *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252 (1942), the Supreme Court made it clear that denying a defendant the assistance of his own lawyer in any case constituted a per se violation of "fundamental fairness." In *Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, (1954), the Supreme Court stamped the right of Pe-

titioner "to be heard through his own counsel" as "unqualified." Recalling the words of Justice Sutherland in *Powell v. Alabama*, supra:

> "Even the intelligent and uneducated layman has small and sometimes no skill in the science of law . . . He requires the guiding hand of counsel at every step in the proceedings against him."

The later case of *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, (1961) held, in effect, that a state may not deny a criminal defendant the right to have his own counsel guide him on direct examination.

All three attorneys, Powell, Emerson, and Garrett, stated that Respondent had been informed and had agreed to an "office arrangement" among the three attorneys whereby they would all work together on the case and share in the distribution of profits. Garrett also stated that he had visited with Respondent in June or July before the trial and had discussed the case with him. This was of course denied by the Respondent who testified as follows:

"Q Now, did you ever tell Mr. Garrett that you did not want him to represent you?

"A I had never, until Mr. Garrett sent for me out of the hold-over tank, known that he was supposed to represent me, until the judge walked in the door.

"Q *My question to you was: Did you tell Mr. Garrett, 'No, I do not want you to represent me, I want Mr. Powell to represent me?'*

"A *No, I didn't tell him direct.*

"Q Well, indirectly did you tell him?

"A Well, I asked how could he represent me?

"Q What did he say to that?

"A He said I had nothing to worry about.

"Q Did you ever tell the Judge that your lawyer was not present in the courtroom?

"A No, I didn't have—well, I didn't have time; as I said before, I didn't have nowhere to stand up and shout or stop the trial, I didn't know what procedure to do to stop the trial.

"Q So you went along?

"A He kept coaxing me along, making me assume everything was all right.

"Q *Will you please explain to the Court here why when you testified—you were on the stand testifying in your behalf—you didn't tell the Court that he was not your lawyer?*

"A My trial was—once again, I didn't want to come in contempt of Court.

"Q You thought that would put you in contempt of Court.

"A I didn't know the statutes, under contempt.

"Q And you were afraid to speak up?

"A Indirectly, I was afraid, yes, sir.

"Q You weren't familiar with courtroom procedure very much?" (T.E. 57-59).

Assistant District Attorney Frank Puckett, Jr., who prosecuted Respondent at the original trial testified to the following:

"THE COURT: Judge Walton appointed Garrett to represent him, I guess. I don't know whether that occurred or not, unless the Defendant was telling a complete untruth, how he could be so confused.

"THE WITNESS: I have my own impression of it. I thought —

"THE COURT: You thought Garrett was the employee?

"THE WITNESS: Yes.

"THE COURT: Because the record doesn't reflect an appointment.

"THE WITNESS: I'm almost certain Mr. Garrett was employed." (T.E. 98-99).

Respondent was no stranger to courtroom procedures and was not without previous criminal experience. He had stood before the bar on numerous occasions. (S.F. 41 and T.E. 51-56). One of Respondent's prior convictions was for possession of marijuana. (S.F. 41 & 42). There was no specific finding by the United States District Court below on this issue. However, the Court stated that "at the trial, Petitioner was represented by an attorney other than the retained attorney and his associate. The evidence is not clear as to whether this attorney was also an associate of the employed attorney, although he did share the same office."

The State of Texas did not deny Respondent the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution. To honor Respondent's claim is to implicitly censure the trial court, as the United States District Court below is saying, in effect, that the trial court was blind to injustice committed in its presence. To readily honor the claim would force the trial judge to intervene whenever possible error is being committed by the defense attorney; and would permit a lawyer with a desperate case to insure his client a new trial by deliberately committing

error. The Fourteenth Amendment only proscribes state activity, and without *actual notice* of the defense lawyer's inadequacies, misconduct, or lack of preparation, the State has not deprived the defendant of due process. See *Howard v. Beto*, supra and *United States ex rel. Wilkins v. Bannmiller*, supra.

In this situation, it is fair to say that Respondent is presumed to have acquiesced in all of his lawyer's activities unless he notified the court to the contrary. In view of the fact that Respondent has made his own choice of counsel, he must bear the responsibility for the consequences, or at least a much greater responsibility than the indigent defendant for his appointed counsel.

If the trial court must guide and steer the course of a man's defense, then a lawyer's freedom of choice in realms heretofore thought to be within the counsel's judgment (such as trial tactics and defensive strategy) has been dealt a death blow. Moreover, a matter of more critical importance would be, under any other rule, the inescapable demise of the adversary system.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Respondent's attorney by depositing same in the United States Mail, postage prepaid, First Class, to Mr. Marvin O. Teague, Attorney at Law, 400 State National Building, 412 Main Street, Houston, Texas 77002 this the ____ day of _____, 1970.

GILBERT J. PENA
Assistant Attorney General

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28696

THADDEUS KING, JR.,

Petitioner-Appellee.

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(July 6, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: This is an appeal by the State of Texas from a state prisoner's application for writ of habeas corpus granted by the District Court, Southern

District of Texas, on the grounds that the petitioner was denied effective assistance of counsel at his trial. We affirm.'

Thaddeus King, Jr., (hereinafter petitioner) was arrested on the night of January 24, 1966, for possession of heroin. Shortly thereafter, petitioner's aunt contacted an attorney (hereinafter First Attorney) to represent petitioner, and a fee was agreed upon and paid by her. In early February, First Attorney and an assistant (hereinafter Second Attorney) visited with the petitioner at the county jail and discussed his case with him for approximately twenty minutes.' On February 25th, an examining trial was held, at the conclusion of which petitioner was bound over to the grand jury. At this trial, petitioner was represented by Second Attorney. Other than these two contacts with lawyers, the petitioner was left in the dark as to the progress of his case until the day of his trial over seven months later.

On the day of the trial, petitioner was contacted in the "holdover tank" in the courthouse by a third lawyer (hereinafter Third Attorney) and told by the lat-

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'Each case involving the constitutional issue of effectiveness of counsel depends on the facts—the specific conduct of the parties involved. See, e.g., *Roberts v. Dutton*, 5 Cir. 1966, 368 F.2d 465; *Williams v. Beto*, 5 Cir. 1965, 354 F.2d 698; *MacKenna v. Ellis*, 5 Cir. 1960, 280 F.2d 592. In assessing what the true facts are, the District Court is allowed much discretion as to the credibility of the witnesses testifying at the habeas corpus hearing under Rule 52(a), F.R.C.P. The District Court here, through its Findings of Facts, has chosen to discredit much of the testimony of the state's witnesses and to accept much of that of petitioner's witnesses. Such decision is supported by the record in this case as is the following version of the facts.

'Both First and Second Attorney testified that the interview lasted one to one and a quarter hours.

ter that he would represent him at his trial. Petitioner testified that he did not know Third Attorney, had never talked to him, nor had he even heard his name mentioned.*

As to what then transpired, petitioner testified as follows:

> A. I encountered [sic] [Third Attorney] as to [First Attorney's] whereabouts. I asked him if he would see [First Attorney] and please tell him I am up here, and I don't know if he notified him or anyone. I told him I would like to see him right away. And he said, "What are you all going to do, are you going to pick a jury, too?"
>
> And I said, "No, I don't think we will pick a jury, I will go before the Judge."
>
> * * * *
>
> Q. Then what happened?
>
> A. He walked away, and about ten minutes later a bailiff came and said, "King."
>
> And I said, "Yes."
>
> And he said, "Come on," he said, "with me," and opened the door and I went with him, and on the way I asked him, "Has the trial started already?" I was thinking I was going to be a witness in Walton's (a co-defendant being tried

*All three attorneys stated that petitioner had been informed of an "office arrangement" among the three attorneys whereby Third Attorney shared office space with First Attorney and the two worked together on criminal cases often with a specified distribution of the profits. Third Attorney also stated that he had visited with petitioner in June or July before the trial. However, this testimony was not substantiated, was denied by petitioner and was excluded from the District Court's Findings of Facts.

separately) case. And he said, "No, your lawyer wants to talk to you," he say, and I was wondering why he hadn't come to the jail.

And I said, "Okay."

I went to this courtroom and he opened the door and [Third Attorney] was sitting at the table and the court reporter, I imagine, just two other people were in the courtroom, and I said, "I don't see my lawyer."

And so [Third Attorney] said, "Come here." And he called me over. And, again, I asked [Third Attorney] I said, "Did you see [First Attorney]?"

And he said, "Oh, he will be along after awhile."

And I sat down, and he said, "Is this"—he handed me my preliminary record (transcript of examining trial) here and asked me "Is this what happened at your preliminary trial?"

And I began reading and [Third Attorney] let me read it. He didn't say anything else about representing me or whether he was going to represent me or not. So I began reading, and I say, "Yes, this is about what happened."

"You are not going to get a jury?"

And I said, "No, [Third Attorney]."

At approximately this time the door opened to my left and the Judge was walking in. They were saying "Everybody stand up." So I looked around to see who was going to be tried, and at this point [Third Attorney] said, "The Judge appointed me to represent you."

And, again, I said, "Why didn't [First Attorney] show?"

And he said, "That's all right." Said, "You waive the jury." And I signed a waiver of the jury, and I kept mumbling between [Third Attorney] and myself, and the Judge got seated and said, "Be quiet."

And I looked around again to see if [First Attorney] was coming, and no [First Attorney].

So, he got his legal pad out after he had told me the Judge appointed him, and I didn't know whether I would be out of order to just ask him, or what have you, or stop the trial. I wasn't familiar here. And he turned over to the legal pad and marked on a piece of paper and asked me what happened.

And I say, "[Third Attorney], you can't defend me, you don't know anything about my case."

And he said, "Don't worry about it." And this is how my trial began, Lawyer Teague.

Q. Prior to this time had you and [Third Attorney] had any discussion whatsoever about your case?

A. I had never said anything to [Third Attorney] about my case prior to this.[4]

The trial itself lasted one hour and thirty-five minutes. The petitioner's signing of the waiver of jury

[4]Third Attorney testified that he had seen petitioner on other occasions and on the weekend before the trial but only as he was, in his own words, "passing through the jail corridors themselves, and he would talk to me at the peep-hole window there when other prisoners were lined up to discuss their particular cases with me". There was testimony from Third Attorney that he had read the transcript of the examining trial, but there was no evidence of extensive briefing of Third Attorney by Second Attorney.

form appears from the evidence to have been an informed and intelligent waiver as the consequences of his choice had been previously explained to him by First and Second Attorneys. There does not appear to have been extensive discussion between Third Attorney and petitioner on the plea that should be entered, petitioner insisting he was not guilty. Nor was there any credible evidence that Third Attorney had engaged in plea bargaining with the District Attorney.

When the state offered into evidence the tinfoil of heroin, without which the state would admittedly have not had a case against petitioner, there was no objection made, nor any motion to suppress, even though the heroin was allegedly thrown from a car in which three people were riding and later picked up on the street by a police officer. There was no fingerprint evidence introduced by the state nor any other evidence introduced that would have connected the heroin to the petitioner.

As far as additional evidence which Third Attorney could have brought forth on petitioner's behalf, there were at least two other witnesses whose testimony may or may not have been favorable to petitioner. Third Attorney did not investigate or interview either of these witnesses.

Also at the trial Third Attorney specifically asked petitioner about past convictions to which petitioner responded he had been convicted fourteen years ago. While the answer was not responsive, the question was unnecessary and is indicative of lack of counselling with petitioner.

At the end of the trial, petitioner was sentenced to sixteen years. No effort was made to obtain a new trial

or to appeal. Petitioner testified that before he was even aware that he was being tried, he was back in his jail cell without ever having had the opportunity to tell his side of the story.

The District Court, examining Third Attorney's file on petitioner's case, discovered therein only a single sheet of paper which was blank except for the notation, "Defendant, Thaddeus King, fee, $300.00" and the date "10-9-66 — Closed" followed by Third Attorney's initials.*

The generally accepted standard by which to determine whether a defendant has been denied effective assistance of counsel has been set out in *Brown v. Beto,* 5 Cir., 1967, 377 F.2d 950, 957-958:

> "The actual standard of incompetency applied by the overwhelming majority of courts is stated as follows: Incompetency of counsel such as a denial of due process and effective representation of counsel must be such as to make the trial a farce, sham, or a mockery of justice." [Citation omitted.] This court has defined "effective counsel" in terms of a "reasonable counsel" standard: "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *MacKenna v. Ellis,* 5 Cir., 1960, 280 F.2d 592.

See also *Odom v. United States,* 5 Cir., 1967, 377 F.2d 853.

The cumulative effect of the above facts, as so found by the District Court and supported by the record,

*Third Attorney testified that his notes had been lost.

is that the petitioner was denied effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution. All of the above facts, taken together, demonstrate that the petitioner's attorney at his trial was not "counsel reasonably likely to render and rendering reasonably effective assistance." *MacKenna,* supra, at 599.

We conclude that the District Court, by measuring the above facts against this legal standard, was not clearly erroneous in its finding that "the legal services accorded petitioner were so poor that he did not have the opportunity to present his side of the story . . . [and] was, therefore, denied effective assistance of counsel, a fair trial, due process of law, and is entitled to habeas corpus." The Court's order that petitioner be discharged from the custody of the state without prejudice to the state to retry petitioner upon indictment is therefore

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. 67-H-901

THADDEUS KING,

Petitioner

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent

Memorandum and Order

This is an application for habeas corpus filed by petitioner, Thaddeus King, seeking relief under 28 U.S.C. §§2241 *et seq.*

On October 10, 1966, petitioner was convicted in Criminal District Court No. 4, Harris County, Texas, on a charge of unlawful possession of heroin. The Texas Court of Criminal Appeals affirmed on June 21, 1967. *King v. State,* 416 S.W.2d 823 (Tex. Cr. App. 1967). Petitioner's motion for rehearing was thereafter denied on July 26, 1967.

After that, petitioner applied for habeas corpus in the convicting court where he was denied permission to file. Again, the Texas Court of Criminal Appeals denied him relief. As respondent has admitted, petitioner has exhausted his available remedies in the courts of the State of Texas. The requirements set forth in *Texas v. Payton,* 390 F.2d 261 (5th Cir. 1968), have been satisfied.

Petitioner's sole contention is that he did not have the effective assistance of counsel within the spirit of the Sixth and Fourteenth Amendments to the United States Constitution.

Since the time of the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), it has not been doubted that each person accused of a crime, regardless of his ability to pay the costs, must have an attorney to represent him at trial if he wants one. By "assistance of counsel" the Sixth Amendment does not mean any assistance will do, but that there must be effective assistance. *Powell v. Alabama*, 287 U.S. 45 (1932); *Avery v. Alabama*, 308 U.S. 444 (1940). See also *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967). In the latter case, effective assistance was defined in the following terms:

> "'. . . Incompetency of counsel such as a denial of due process and effective representation by counsel must be such as to make the trial a farce, sham, or mockery of justice.' This Court has defined 'effective counsel' in terms of a 'reasonable counsel' standard: 'We interpret the right of counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'" 377 F.2d 958.

As was said in *Williams v. Beto*, 354 F.2d 698, 705 (5th Cir. 1965), "Lawyers are not required to be infallible. If they were, law practice would soon disappear. . . ."

If, then, the Sixth Amendment does not require that criminal defendants have a perfect attorney, what does it require? The answer is that counsel must undertake to do those things necessary to the best interests of his

client. As a bare minimum, this includes sufficient consultation with the accused to bring about an understanding of the case, advice to the accused of his constitutional rights, particularly his constitutional right to a trial by jury, and at trial a probing examination and cross-examination of witnesses, reasonable attempts to obtain and offer any defensive evidence, and if at all possible sufficient objections to the introduction of the evidence by the state so that the trial judge can have an opporunity to clearly understand the legal problems involved before making a ruling, and the presentation of some oral arguments on behalf of the accused. See *Williams v. Beto*, supra, citing *Collingsworth v. Mayo*, 173 F.2d 695 (5th Cir. 1949).

Unquestionably, these standards apply to attorneys which have been assigned to represent indigents. Whether they are applicable where the accused has retained counsel is another matter. At least one case in the Fifth Circuit has held that there is a distinction between lack of effective counsel and being denied the right to effective counsel. *Howard v. Beto*, 375 F.2d 442 (5th Cir. 1967). There has, however, been an indication in another Fifth Circuit case that the same considerations govern regardless of whether the attorney is appointed or retained. See *Williams v. Beto, supra*, at p. 700, citing *Williams v. United States*, 345 F.2d 733 (C.A.D.C. 1965), wherein Judge Burger, now the Chief Justice of the Supreme Court, said:

> "We have no more right to ask volunteer lawyers to stultify themselves or prostitute their professional standards than we would have to demand that paid lawyers do so."

Here, petitioner was arrested on January 24, 1966,

almost nine months before his trial. In the early part of February, petitioner's aunt, Ola Jones, contacted an attorney to represent petitioner in the matters pending against him. A fee was agreed upon and paid. Thereafter, this attorney, together with an associate, went to the Harris County Jail and talked to petitioner. At the examining trial the associate appeared on behalf of petitioner. Other than the first visit and the examining trial, neither the employed attorney nor his associate ever contacted petitioner again prior to his trial. At the trial, petitioner was represented by an attorney other than the retained attorney and his associate. The evidence is not clear as to whether this attorney was also an associate of the employed attorney, although he did share the same office. This attorney (the one appearing on behalf of petitioner at the trial) had a casual look at petitioner while petitioner was in jail, but no contact was had with petitioner and this attorney never visited with petitioner while petitioner was in jail. The one and only time this "trial attorney" ever conferred with petitioner was on the day of trial. That conference lasted something less than thirty minutes.

Petitioner's trial began at 1:40 P. M. and ended the same afternoon at 3:15 P. M. When the state offered into evidence the heroin, no objection was made, although the heroin introduced into evidence was heroin allegedly thrown from a car and picked up on the street. Apparently, no fingerprints were made of the package containing the heroin to determine whether petitioner actually handled it. Petitioner claimed to have had certain witnesses he wanted to call on his behalf, but the "trial attorney" refused to call them. At

the habeas hearing the "trial attorney" testified he did not see any reason to put these witnesses on the stand even though he never talked to them. The only evidence the "trial attorney" offered on the point of whether or not in his opinion he rendered effective assistance of counsel was his expressed opinion that he did everything petitioner wanted him to do. This Court concludes that the "trial attorney" actually wanted petitioner to plead guilty but petitioner refused, expressing his innocence at that time. At the conclusion of the trial petitioner was sentenced to 16 years, even though from the time of his arrest to the present, he strongly insisted upon his innocence.

The employed attorney's file consisted of a manila folder with petitioner's name on it. Inside the folder was a single sheet of paper which was blank except for the following: "Defendant, Thaddeus King, fee, $300.00." The only other notation on the file was the notation "10-9-66, Closed" which was initialed by the "trial attorney." The record is absolutely bare of any evidence of any work actually done in connection with petitioner's case.

It must be concluded that the quality of the legal services accorded petitioner were so poor that he did not have the opportunity to present his side of the story. He was, therefore, denied effective assistance of counsel, a fair trial, due process of law, and is entitled to habeas corpus.

For the above reasons, the petition for the writ of habeas corpus will be granted and petitioner discharged from the custody of the respondent without prejudice to the state to retry petitioner upon the indictment within ninety days from this date.

This Memorandum and Order will constitute a findings of fact and conclusions of law of this Court.

The Clerk is directed to file this Memorandum and Order and send copies to the attorneys of record.

DONE at Houston, Texas this 6th day of November, 1969.

JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28696

D. C. Docket No. CA 67-H-901

THADDEUS KING, JR.,
Petitioner-Appellee,

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that respondent-appellant pay to petitioner-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 6, 1970

Issued As Mandate: